No. 85-1963

In The Supreme Court Of The United States

October Term, 1985

TYLER PIPE INDUSTRIES, INC.,
Appellant

vs.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee

On Appeal from the Supreme Court of Washington

REPLY TO MOTION TO DISMISS OR AFFIRM

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I.

THE SIMPLE ECONOMIC REALITY OF THE STATE OF WASHINGTON BUSINESS AND OCCUPATION TAX IS THAT IT IMPOSES A SINGLE TAX ON LOCAL BUSINESS AND A DOUBLE OR TRIPLE TAX ON OUT-OF-STATE BUSINESS AND IT THEREFORE DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The Court, in *Armco, Inc. v. Hardesty,* U.S. , 104, S.Ct. 2620, reh. den. U.S. , 105 S.Ct. 285 (1984) struck down as violative of the Commerce Clause of the United States Constitution a West Virginia taxing statute that the State of Washington, in its *amicus* brief filed in that case, described as "very similar" to the statute that Appellant asserts is unconstitutionally applied to it in this case. The State of Washington now seeks distinctions and technical differences of no significance, economic or otherwise, in an attempt to undermine the Court's holding in the *Armco* case and to obscure the simple questions presented in this case.

Appellant sold on the wholesale level in the State of Washington products that it manufactured out-of-state,[1] but was subjected to the same amount of State of Washington taxes that an in-state manufacturing company paid on both its manufacturing and wholesale activities in-state. Although a Washington manufacturer is also required to pay the wholesale tax imposed upon Appellant, the Washington manufacturer is exempted from the manufacturer's tax on its in-state sales, which exemption is not available to out-of-state manufacturers. Washington does not have to tax manufacturers, but if it chooses to do so, it cannot subsidize through its taxing system manufacturers who sell in-state. As a result, in addition to paying its fair share of taxes in Texas and other states in which Appellant manufactures its products, Appellant also had to pay to the State of Washington the full tax burden of a company that operated solely in the State of Washington.

[1]Appellant sells on the wholesale level products manufactured by its two wholly-owned subsidiaries. These subsidiaries do not sell or distribute any products except through Appellant. The sole reason why Appellant and its subsidiaries were separately incorporated was to comply with technical Interstate Commerce Commission regulations regarding the transportation of manufactured goods that are no longer in effect. Appellant and its subsidiaries share the same officers and directors, occupy the same facilities and are engaged in the same business. The issue of the separate incorporation of Appellant's manufacturing divisions was first raised by the State of Washington in the appeal to the Supreme Court of Washington, but in any case has no validity since there is no economic substance to the separate incorporation of the manufacturing divisions.

The most clear and concise condemnation of the Washington taxing scheme may be found in the Court's own words finding the West Virginia tax unconstitutional [with the relevant information pertaining to the Washington tax inserted in brackets for comparison at the relevant points]:

> "[W]hen the two taxes are considered together, discrimination against interstate commerce persists. If Ohio [Texas] or any of the other 48 states imposes a like tax on its manufacturers—which they have every right to do—then Armco [Tyler Pipe] and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia [Washington] will pay only the manufacturing [wholesaling] tax. For example, if Ohio [Texas] were to adopt the precise scheme here, then an interstate seller would pay the manufacturing tax of 0.88% [0.44%] *and* the gross receipts tax of 0.27% [0.44%]; a purely intrastate Seller would pay only the manufacturing [wholesale] tax of 0.88% [0.44%] and would be exempt from the gross receipts [manufacturing] tax.

U.S. at ; 104 S.Ct. at 2623-24. In *Armco,* the Court found that a statutory scheme that imposed upon out-of-state businesses a tax burden equal to 130.68% of that imposed upon in-state businesses unconstitutionally discriminated against interstate commerce. The Court should therefore find in this case that

a statutory scheme that imposes upon out-of-state businesses a tax burden equal to 200% of that imposed upon in-state businesses is no less discriminatory against interstate commerce.[2]

II.

THE STATE OF WASHINGTON ASSERTS NEXUS TO IMPOSE A GROSS RECEIPTS TAX WHEN THE ONLY IN-STATE ACTIVITY IS SOLICITATION OF SALES. THIS ASSERTION VIOLATES THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION, AS HELD BY THE COURT, AND CONGRESSIONAL POLICY AS EMBODIED IN THE FEDERAL INTERSTATE INCOME TAX ACT.

Contrary to the statements made by the State of Washington in its Argument in Support of its Motion to Dismiss or Affirm, the issue in this case is not the number of employees (or deemed employees) of Appellant located in Washington, nor the number of differences between salaried employees and commissioned independent contractors. The issue is simply whether the solicitation of sales on behalf of Appellant in-state is sufficient, in the absence of any other local connections, to give the State of Washington the constitutional authority to tax Appellant.

Mere solicitation of sales in-state has been held by the Court to be insufficient nexus to subject an interstate company to local taxation. E.G., *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1967), *Norton Company v. Departmental Revenue,* 340 U.S. 534 (1951); and *McLeod v. J. E. Dilworth Company,* 322 U.S. 327 (1944). Likewise, Congress has declared as federal policy in the Federal Interstate Income Tax Act, 15

[2]The State of Washington also imposes a 0.44% tax on the extraction of raw materials in-state, but businesses subject to this tax are exempted if they also manufacture or wholesale in-state. Thus, a business that extracts raw materials in one state, manufactures in a second and wholesales in Washington would bear 300% of the tax burden of a like in-state business.

U.S.C. Sections 381 *et seq.* that solicitation of in-state sales is insufficient to establish nexus for a *net* income tax, which policy should also apply to a *gross* income tax, like the State of Washington Business and Occupation Tax, whose sole difference from a net income tax is that it allows no deduction from taxable income of business expenses.[3]

The State of Washington, behind its diversionary discussion of "market information," "goodwill" and "customer relations," very simply wants to tax a company that has no in-state office, no in-state facilities, no in-state operations and no in-state non-sales personnel. The sole activity that the State of Washington asserts as the basis for imposing its tax, no matter how many words it uses to describe this activity, is the solicitation of sales.

CONCLUSION

For the foregoing reasons, the Court should deny the State of Washington's Motion to Dismiss or Affirm and should note probable jurisdiction of this appeal.

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[3]Because no deductions are allowed under the Washington State Business and Occupational Tax, it imposes a greater burden upon interstate commerce than an income tax since a marginal or unprofitable business is burdened no less than a profitable business.

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Reply to Motion to Dismiss or Affirm was made this day of August, 1986, upon all parties required to be served by depositing three copies thereof in the United States Mail, first class postage prepaid, addressed:

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